JEFF HUNT; JOHN GRAY and DESIREE GRAY;
RAMON L. ("SHARKY") WILLIAMS and RAMONA WILLIAMS;
VIVIAN T. SAMPSON and CELINDA TRAVERSIE; RUSTY BREHMER;
MARTY LAWRENCE; TINA CLEMENT; SHARON EATON; and
JEFF HUNT and VICKI HUNT
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-29-A, 94-42-A through 94-47-A, 94-50-A, 94-52-A 1/ — Decided February 9, 1995

Appeal from the approval of the 1993-1998 Grazing Code for the Cheyenne River Sioux Tribe and from the allocation of range units in accordance with that Code.

IBIA 94-47-A affirmed; remaining appeals dismissed.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

   Individual tribal members lack standing to appeal a Bureau of Indian Affairs' decision approving or disapproving a tribal ordinance or resolution.

2. Indians: Tribal Government: Judicial System

   Tribal remedies are not exhausted when a party files an action in tribal court, but fails to complete the entire process available or required under the court rules, including appellate review, if available. An individual cannot rely on the unsuccessful action of another party to argue that exhaustion is futile.

1/ The docket numbers assigned to the individual appeals are as follows: Jeff Hunt--IBIA 94-29-A; John Gray and Desiree Gray--IBIA 94-42-A; Ramon L. ("Sharky") Williams and Ramona Williams--IBIA 94-43-A; Vivian T. Sampson and Celinda Traversie--IBIA 94-44-A; Rusty Brehmer--IBIA 94-45-A; Marty Lawrence--IBIA 94-46-A; Tina Clement--IBIA 94-47-A; Sharon Eaton--IBIA 94-50-A; and Jeff Hunt and Vicki Hunt--IBIA 94-52-A.

A related case, Gene Hunt v. Aberdeen Area Director, IBIA 94-53-A, remains on the Board's docket.

3. Board of Indian Appeals: Jurisdiction--Indians: Tribal Government: Generally

In resolving intra-tribal disputes, nonjudicial tribal institutions have been recognized as competent law-applying bodies.

APPEARANCES: Cheryl Laurenz-Bogue, Esq., Dupree, South Dakota for appellant Jeff Hunt; 2/ Randolph J. Seiler, Esq., Mobridge, South Dakota, for appellants John Gray and Desiree Gray, Ramon L. ("Sharky") Williams and Ramona Williams, Vivian T. Sampson and Celinda Traversie, Rusty Brehmer, Marty Lawrence, and Tim Clement; Cheryl Laurenz-Bogue, Esq., and Eric H. Bogue, Esq., Dupree, South Dakota, for appellant Sharon Eaton; appellants Jeff Hunt and Vicki Hunt, pro sese; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director; Timothy W. Joranko, Esq., Eagle Butte, South Dakota, for the Cheyenne River Sioux Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants, all of whom are members of the Cheyenne River Sioux Tribe (Tribe), seek review of an October 20, 1993, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), approving the Tribe's 1993-1998 Grazing Code, and/or subsequent decisions concerning the allocation of range units (RUs) on the Cheyenne River Sioux Reservation in accordance with that Code. For the reasons discussed below, the Board of Indian Appeals (Board) affirms IBIA 94-47-A and dismisses the remaining appeals.

Background

Pursuant to Article VIII, section 3, of the tribal constitution and 25 CFR 166.10, 3/ the Tribal Council enacted a grazing code (Code) on August 24, 1993, to apply to allocations of RUs on the reservation for

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2/ The Board allowed counsel to withdraw from the case after filing the notice of appeal in IBIA 94-29-A.

3/ Article VIII, section 3, of the tribal constitution provides in part: " Grazing permits covering tribal land may be issued by the tribal council, with the approval of the Secretary of the Interior. Such grazing permits shall not exceed a term of five years."

25 CFR 166.10 provides in pertinent part:

"A tribal governing body may authorize the allocation of grazing privileges without competitive bidding on tribal and tribally controlled Government land to Indian corporations, Indian associations, and adult tribal members of the tribe represented by that governing body. The Superintendent may implement the governing body's allocation program by authorizing the allocation of grazing privileges on individually owned land. The eligibility requirements for allocations shall be prescribed by the governing body, subject to written concurrence of the Superintendent."

1993-1998. 4/ The Code was transmitted to the Superintendent, Cheyenne River Agency, BIA (Superintendent), who concurred in it on August 31, 1993.

On September 16, 1993, Hunt wrote to the Area Director appealing/protesting the approval of the Code. On October 20, 1993, the Area Director upheld the Superintendent's approval of the Code.

Hunt appealed this decision to the Board. This appeal was designated IBIA 94-29-A.

Applications for 1993-1998 allocations were filed during August 1993. The Tribal Council's Land and Natural Resources Committee (Land Committee) considered the applications under the new Code on September 1, 1993. In a subsequent September 8, 1993, meeting, the Land Committee entertained requests for reconsideration of allocation recommendations. The Land Committee's recommendations were presented to the full Tribal Council, which voted on them in open session on September 9, 1993. Although not required by the Code to do so, the Tribal Council allowed disappointed applicants an opportunity to protest its decisions. The Land Committee held hearings on the protests on October 4 and 6, 1993, and the Tribal Council held hearings on the protests on October 8, 1993.

Each of the present appellants applied for allocations of RUs. All of the RUs at issue here included both tribal and individually owned land. The Tribal Council's initial allocation decisions as to these RUs were challenged by either appellants or other tribal member applicants. Each of the appellants participated in the protest proceedings, although Lawrence did not appear at the hearings. The Tribal Council's final decision in each case was to allocate the units to other tribal members or to split a unit between an appellant here and another tribal member(s).

Based on their failure to receive the allocations for which they had applied, Eaton and the Hunts filed actions in the United States District Court for the District of South Dakota challenging both the Code and the allocation decisions. Both cases were dismissed without prejudice on the grounds that the Tribe was an indispensable party which could not be joined because of its sovereign immunity. Eaton v. Babbitt, CIV 93-3041 (D.S.D. Apr. 14, 1994); Hunt v. Babbitt, CIV 93-3043 (D.S.D. Apr. 14, 1994).

The Tribe states that all of the remaining appellants, except Lawrence, filed actions in the tribal Superior Court, seeking preliminary injunctions to prevent the implementation of the allocation decisions by either the Tribe or BIA. According to information provided by the Tribe and not disputed by any appellant, the Superior Court denied the motions filed by the Grays and by Sampson and Traversie, finding that their claims lacked sufficient prospects of success on the merits. The Grays and Sampson and Traversie did not appeal that decision and have not pursued the actions further, although, according to the Tribe, the cases are still technically

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4/ The Tribe states that three public hearings were held to discuss adoption of the Code during the spring and summer of 1993.

pending before the Superior Court. The Tribe also states that the Williams and Brehmer voluntarily dismissed their actions before the hearings on their motions for preliminary injunctions.

The Tribe states that the Superior Court granted Clement a preliminary injunction based on its finding that she would be irreparably harmed by the allocation decision and on its interpretation of the Code as giving her a preference over the tribal members to whom the RU was allocated. The Tribe appealed the preliminary injunction to the Tribal Court of Appeals, which reversed the preliminary injunction and instructed the Superior Court to dismiss the action on the grounds that the Tribe was an indispensable party which could not be joined because of its sovereign immulity.

Because the Tribal Council's decisions concerning the allocations were implemented by the Superintendent, who also applied the decisions to individually owned lands in the various RUs, each appellant also appealed to the Area Director. In apparently identical letters to each appellant, the Area Director upheld the Superintendent's decisions, stating:

> Pursuant to 25 CFR §166.10 (1992), the Tribal Council * * * prescribed eligibility requirements for the allocation of grazing units. The Agency Superintendent concurred in these requirements pursuant to that provision in the regulations, and thereafter [RUs] were allocated by the Tribal Council and permits issued by the Superintendent.
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> In reviewing the Code, there are some concerns that the objectives set out in 25 CFR §166.3(b) (1992) may not be realized to the greatest degree possible because the Tribal Council's allocations criteria may have an adverse effect on the availability of credit to farm and ranch operations on the Cheyenne River Reservation. However, the allocation system established by the Tribal Council represents a valid exercise of tribal authority and does not violate any federal law or regulation. The Superintendent is authorized to concur in the eligibility requirements if they are "satisfactory." In these circumstances, the [BIA] would be substituting its judgment for that of the Tribal Council if it were to overturn the Superintendent's decision to concur with the allocation preferences. Accordingly, I sustain the Superintendent's issuance of grazing permits based on the Tribal allocations.

(Dec. 9, 1993, Letter to the Grays at 1).

Appellants subsequently appealed to the Board. In four orders issued on January 18 and February 3, 1994, the Board noted jurisdictional questions which are considered more fully below, placed the Area Director's decisions into immediate effect pursuant to 43 CFR 4.314(a), 5/ and consolidated the

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5/ Section 4.314(a) provides:

"No decision of * * * an official of the Bureau of Indian Affairs, which at the time of its rendition is subject to appeal to the Board, shall

appeals. The Board advised appellants that, because it had placed the decisions into immediate effect, they could proceed to Federal court, but stated that it would consider the appeals unless appellants notified it that they had filed suit in Federal court. No such notification has been received.

On March 17, 1994, all appellants, except Eaton and the Hunts, filed a statement that they would not file opening briefs, but would rely on the materials submitted with their notices of appeal. Eaton filed a similar statement on March 22, 1994.

Jeff Hunt submitted a brief on April 11, 1994. The Board treats this brief as applying to both IBIA 94-29-A and IBIA 94-52-A. On April 26, 1994, the Board was notified that the Hunts had filed a Chapter 12 bankruptcy petition. The Board severed IBIA 94-29-A and IBIA 94-52-A from the remaining appeals, and stayed further proceedings in them. 6/ After being notified that the bankruptcy proceeding had been concluded, the Board lifted the stay and resumed briefing on June 16, 1994. Both the Area Director and the Tribe filed answer briefs. 7/ No reply briefs were filed.

Discussion and Conclusions

Hunt challenges approval of the Code. In Feezor v. Acting Minneapolis Area Director, 25 IBIA 296, 298 (1994), numerous appellants sought review of decisions approving and disapproving various ordinances passed by the Shakopee Mdewakanton Sioux Community. The Board noted that it had

> stated on a number of occasions that tribal members lack standing to appeal a BIA action to the Board based on a personal assessment of what is or is not in the best interest of the tribe. E.g., Stops v. Billings Area Director, 23 IBIA 282 (1993); Frease v. Sacramento Area Director, 17 IBIA 250 (1989). * * * The guiding principle of these decisions is the Federal policy of respect for tribal self-government, which counsels that the Department refrain from interfering in intra-tribal disputes. * * * This is true * * * even though * * * Departmental approval of the [ordinance is required]. See, e.g., Cheyenne River Sioux Tribe v. Aberdeen Area Director, 24 IBIA 55 (1993) (Even where Departmental approval of tribal enactments is required by statute, review should be undertaken in such a way as to avoid unnecessary interference with tribal self-government).

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fn. 5 (continued)
be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless made effective pending decision on appeal by order of the Board."

6/ Because Gene Hunt had also filed a Chapter 12 bankruptcy petition, IBIA 94-53-A was severed in the same order.

7/ The Tribe's brief related to all appellants; the Area Director's brief addressed only IBIA 94-29-A and IBIA 94-52-A.

Based on the decisions discussed, the Board dismissed the appeals in Feezor for lack of standing.

[1] Hunt falls squarely within these prior cases. If Hunt believes the Tribal Council acted either unwisely or illegally in enacting the Code, his remedy is through tribal judicial and/or political processes. Accordingly, IBIA 94-29-A is dismissed for lack of standing. 8/

Appellants also challenge the application of the Code to deny them certain allocations. From the outset of these cases, the Board informed appellants that they would be required to show that it had jurisdiction over their appeals, and referred them to its prior decisions in Welmas v. Sacramento Area Director, 24 IBIA 264 (1993); Flores v. Acting Anadarko Area Director, 25 IBIA 6, 15 (1993); and Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). The Board instructed appellants to address the issues of whether the actions they sought to have reviewed were BIA actions or tribal actions and whether tribal remedies had been exhausted.

Appellants' responses to the Board's instructions were cursory. They contended only that tribal remedies had been exhausted, because no proceedings were then pending in Tribal court and because, they alleged, any further attempts to pursue their complaints in Tribal Court would be fruitless.

Although, on the merits, each appellant raised arguments specific to the individual RU being sought, the essence of the arguments is quite similar. Appellants all seek review of the Tribal Council's allocation decisions by alleging violations of due process and of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988); various violations of law and abuses of discretion by the Tribal council; financial hardships that would result from the denial of their requested allocations; and violations of the goals of Indian self-determination and self-sufficiency.

In all of their arguments, appellants seek review of decisions made by the Tribal Council. These decisions are intra-tribal matters. The Board has previously stressed that intra-tribal matters should be resolved through tribal forums, and has declined to address such matters, even where it has jurisdiction, in cases where tribal courts have primary jurisdiction over the matters at issue. See Burlington Northern Railroad, supra; Zinke & Trumbo Ltd. v. Phoenix Area Director, 27 IBIA 105 (1995) (declining to consider a case when the correctness of the Area Director's approval of a tribal ordinance was secondary to questions concerning its validity).

[2] It appears that each appellant exhausted whatever tribal administrative remedies were available by participating in the protest proceedings. However, according to the information provided by the Tribe and not disputed by any appellant, only Clement has exhausted tribal judicial remedies. The

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8/ For the same reason, the Board would not address arguments in the remaining appeals concerning approval of the Code.

other appellants either did not seek tribal judicial relief, or did not complete the review process. Tribal judicial remedies are not exhausted when a party files an action but fails to complete the entire process available or required under the rules of the forum. 9/ Furthermore, each individual is required to exhaust tribal judicial remedies. An individual cannot rely on the fact that another person completed the tribal judicial review process unsuccessfully to argue that exhaustion is futile.

Accordingly, the Board finds that the appeals filed by the Grays, the Williams, Sampson and Traversie, Brehmer, Lawrence, Eaton, and the Hunts must be dismissed for failure to exhaust tribal remedies.

Clement is the only remaining appellant. She exhausted tribal judicial remedies, with her Tribal Court case being dismissed on indispensable party/sovereign immunity grounds. The question as to Clement is whether the fact that she exhausted tribal remedies--with an unsatisfactory outcome--means that she has access to this Federal forum to litigate the same issues raised, but not resolved, in Tribal Court.

Most of the issues Clement raises before the Board arise from actions taken and decisions made by the Tribal Council. As the Board has stated on numerous prior occasions, it does not have authority to review the actions of duly constituted tribal governing bodies. See, e.g., Welmas, supra; Blaine v. Aberdeen Area Director, 21 IBIA 173 (1992); Thompson v. Eastern Area Director, 17 IBIA 39 (1989). The fact that Clement's case was not heard on the merits in Tribal Court because of the Tribe's failure to waive its sovereign immunity does not grant the Board jurisdiction it does not otherwise have.

[3] Assuming arguendo that the Board had concluded it could review those arguments based on Tribal Council actions, it would have declined to exercise that jurisdiction under the particular facts of this case in which Clement was given an opportunity to protest the Tribal Council's initial decision before both the Land Committee and the Tribal Council. Citing United States v. Mazurie, 419 U.S. 544 (1975), the Supreme Court noted in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978), that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies."

The Board finds it lacks jurisdiction over those arguments in Clement's appeal which seek review of actions taken by the Tribal Council.

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9/ In Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 16-17 (1987), the Supreme Court stated:

"The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. * * * Until appellate review is complete, the [tribal courts] have not had an opportunity to evaluate the claim and federal courts should not intervene."

To the extent Clement alleges improprieties by the Area Director, BIA's only involvement in this matter was to implement the Tribal Council's decision as to the tribal land in the RU sought by Clement, and to allow that decision to apply to the individually owned land in the unit. Neither this Board nor BIA has authority to order the allocation of tribal land in a manner inconsistent with the expressed wishes of the Tribe. See, e.g., Lande v. Acting Billings Area Director, 22 IBIA 188 (1992). Assuming arguendo that the Area Director's application of the Tribal Council's decision to the individually owned lands in the RU is an independent decision over which the Board might have jurisdiction, the Board finds no abuse of discretion or violation of law where the Area Director deferred to the Tribal Council's decision, which was made after a thorough review of Clement's challenge to that decision. 10/ In fact, the Board concludes that deference here shows proper respect for tribal self-government.

Accordingly, the Board concludes that the Area Director's decision as to Clement should be affirmed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IBIA 94-29-A is dismissed for lack of standing; IBIA 94-42-A, IBIA 94-43-A, IBIA 94-44-A, IBIA 94-45-A, IBIA 94-46-A, IBIA 94-50-A, and IBIA 94-52-A are dismissed for failure to exhaust tribal remedies; and IBIA 94-47-A is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

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10/ The Board notes that there is no evidence in the record that any individual landowner objected to the Tribal Council's allocation decision.